No. 75-1641

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN EDWARD WOODLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a warrant to search his home was issued without probable cause and that the district court committed plain error in not suppressing the evidence seized as a result of the search.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d). Imposition of sentence was suspended and petitioner was placed on two years' probation on condition that he pay a fine of $2,500 within 30 days. The court of appeals affirmed *per curiam* on January 9, 1976 (Pet. App. A1-A3; 527 F. 2d 608). The petition for a writ of certiorari was filed on April 7, 1976, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, the question raised does not merit further review.

1. On March 19, 1974, a United States Magistrate issued a search warrant authorizing a search of petitioner's residence (Pet. App. A7). The affidavit submitted in support of the warrant stated that an informant who had proven reliable on at least twenty occasions and whose information had led to two federal convictions had notified the Bureau of Alcohol, Tobacco and Firearms that an unknown amount of dynamite and blasting caps was being stored on petitioner's premises, in violation of 18 U.S.C. 842(j) (Pet. App. A6). A search conducted pursuant to the warrant uncovered ten firearms and a quantity of narcotics.[1] No explosives or blasting caps were found.

Petitioner did not file a pretrial motion to suppress the seized evidence, nor did he object to its introduction at trial. On appeal, the court of appeals rejected his claim that the search warrant had been issued without probable cause and that the trial court had committed plain error in admitting the evidence.

2. The trial court properly admitted into evidence the firearm seized pursuant to the search warrant. Defense counsel, rather than the court, has the obligation to challenge the admissibility of evidence alleged to have been illegally obtained (see *Kuhl* v. *United States*, 370 F. 2d 20, 26 (C.A. 9) (*en banc*); cf. *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976, slip op. 11), and an unjustified failure to make a timely motion to suppress constitutes a waiver of that right. See Fed. R. Crim. P. 41(f) and 12(b)(3);

[1]Petitioner was indicted for possession of one of the firearms. He was also charged with possessing methamphetamine (count two) and sodium phenobarbital (count three) with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and (2). The trial court granted petitioner's motion to dismiss count three at the close of the government's case (Tr. 160) and declared a mistrial on count two when the jury was unable to reach a verdict.

United States v. *Mauro*, 507 F. 2d 802, 805-807 (C.A. 2) certiorari denied, 420 U.S. 991; *United States* v. *Ceraso*, 467 F. 2d 653, 659 (C.A. 3); *United States* v. *Blackwood*, 456 F. 2d 526, 529 (C.A. 2), certiorari denied, 409 U.S. 863; *Farnell* v. *Solicitor General of the United States*, 429 F. 2d 1318 (C.A. 5); *Darden* v. *United States*, 405 F. 2d 1054, 1055 (C.A. 9); *United States* v. *Phillips*, 375 F. 2d 75, 78-79 (C.A. 7), certiorari denied, 389 U.S. 834.

Petitioner has offered no justification for his failure to object to the admission of the evidence either before or during trial. See Pet. 4. He unquestionably was aware that the firearm had been seized pursuant to a search warrant and that the government intended to introduce it at trial. In these circumstances, petitioner's claim may not be raised for the first time on appeal.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

[2]Petitioner contends (Pet. 5) that "[t]he record contains no evidence that any information outside the affidavit was presented to the magistrate at the time the search warrant application was made." This is not surprising in light of petitioner's failure to challenge the validity of the search warrant in the district court.